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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-336

DELTA AIR LINES, INC.,
Petitioner,

VERSUS

JAMES McBRIDE,
Respondent.

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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Petitioner, Delta Air Lines, Inc., replies to the Respondent's Brief in Opposition to Petition for Certiorari as follows:

Respondent McBride has failed to respond to the issues presented in Delta Petition for Certiorari. Instead, he has constructed his own questions (Opposition, pp. 1-2) which do not meet the questions presented by Delta in its Petition.

I.

Prior to filing his Brief in Opposition McBride had not at any time during the course of this litigation manifested an interest in Delta employment practices outside the Memphis terminal. Neither in his pleadings, his oral or written argument, nor through evidence sought to be introduced has he asserted that he represented blacks at other Delta facilities. However, in an effort to support the suggestion of the court of appeals that this case be remanded for consideration of Delta employment practices on a *systemwide* basis, McBride in his Statement of the Case now asserts for the first time that he does have an interest in employment practices outside the Memphis terminal.

The Brief in Opposition states that fellow employees of McBride testified "at some length as to the current discrimination continuing at the Memphis airport *and otherwise in Delta in the other cities in the South.*" This is simply not the case. No witness for McBride was qualified to testify concerning employment practices outside the Memphis terminal, and none attempted to do so. If the

concept of adequate representation required by Rule 23 of the Federal Rules of Civil Procedure is to have any meaning, a party cannot following appeal become a representative for purported class members when he asserted no claim in their behalf in his pleadings, during the trial, or in the court of appeals. Having progressed through the entire trial and appellate process without challenging Delta's systemwide employment policies and having failed in his attempts to establish discrimination on the local terminal level, McBride cannot now be permitted to shift his ground in order to salvage his case.

II.

In an effort to sidestep the important questions raised in Delta's Petition, McBride has framed an entirely new issue which attempts to portray the review sought in this Court as a factual review of Delta employment statistics, but no such review is sought here since such questions come into play only if McBride is a proper class representative and may properly make such claims. McBride has leveled an attack against the alleged low utilization of blacks in Delta's work force. However, he has chosen to ignore the great strides which Delta has made at the Memphis terminal in the advancement of blacks to higher paying positions despite relatively static work force requirements resulting from slack economic conditions and erratic traffic volume patterns.

While Delta has been able to avoid layoffs during periods of low traffic volume, it has not needed to expand its work force. Nevertheless, changes in positions at Memphis during 1974 through hiring, layoffs and transfers resulted in an addition to Delta's Memphis work force of twenty-seven persons, with blacks accounting for thirteen of this increase, or 48.17 per cent. As to promotions

in the Memphis area, black terminal employees gained eleven out of twenty available slots, or 55 per cent of available openings.

An examination of the table of bids at the Memphis terminal for 1974 reveals that out of eighteen blacks who filed bids during 1974, three were defeated in each of their bids solely by other competing blacks, three others lost to a combination of blacks and whites, and eleven were successful in gaining advancement as sought. (Trial Exhibit 29.) Most significantly, the only Memphis terminal employee who has advanced to a supervisory position since 1969 is a black.

McBride has further erroneously asserted that no black makes more than a white "in a comparable circumstance." Delta has a basic pay rate for each job position with pay being based upon a combination of years of Company service and years of service in grade. This policy is applied neutrally to all blacks and whites, and the payroll records of November 1975 show that where blacks have greater service in grade they receive higher pay than whites with less time in grade. (Trial Exhibit 32.) Thus, even if the term "comparable circumstances" is taken to require the discounting of seniority pay increases, the record shows that a number of blacks receive more than whites in the same job position.

Delta's policy and practice have been to give minorities first opportunity to move into vacancies as they occur. Title VII does not require that existing white employees be discharged or demoted to make way for blacks. *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 450 (5th Cir. 1973). As a result the figures given by McBride in his Brief in

Opposition are inapposite,[1] and the figures quoted above show that Delta has complied with the letter and spirit of the Civil Rights Act of 1964.

Furthermore, while Delta has felt compelled to respond to McBride's erroneous and misleading assertions about the merits of his discrimination claim, a statistical review of employment figures is not required by Delta's Petition, nor is it necessary to a decision of the questions the Petition raises. Delta asks this Court to review the standards by which the court of appeals has ordered a remand for consideration of the alleged class claims. Only if this Court should determine remand to be appropriate would the factual issues raised by the respondent in his Brief in Opposition be proper for consideration and then in the first instance by the district court.

III.

McBride has totally misconstrued the import of the first question presented by Delta in its Petition. His principal attack is based upon the proposition that an EEOC charge is not to be interpreted so narrowly that a layman's real grievances would be denied redress because of a mere technicality of language, a proposition with which we agree. However, he has failed to address the issue raised in Delta's Petition as to the standards by which the EEOC charge, investigation and concilation limit the permissible scope of an individual's Title VII complaint.

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[1]The job classifications referred to at pp. 2 and 3 of McBride's Brief in Opposition ceased to exist January 1, 1973, although the figures he attempts to associate with them are from a later date. McBride's fundamental lack of familiarity with the Delta system of job classifications for the period of time which he seeks to litigate further demonstrates the inappropriateness of his acting as a class representative.

McBride has also quoted extensively from *EEOC v. General Electric Company*, 532 F. 2d. 359 (5th Cir. 1976), which stands for the proposition that evidence of discriminatory action discovered by the EEOC in the course of its investigation is not to be ignored by the EEOC, nor is a complaint based upon a reasonable investigation to be narrowly construed because of an apparently narrow charge. This is not the issue involved in this litigation. Delta is questioning the action of the court of appeals in directing a remand to the district court for the purpose of conducting a systemwide investigation of employment practices when such an investigation was not suggested by the charge, was not investigated by the commission, and was not embraced within the scope of conciliatory efforts.

Every circuit which has addressed the point other than the Sixth has required that Title VII judicial actions bear a reasonable relationship to the scope of the underlying EEOC charge, investigation and conciliation—a relationship usually expressed as a limitation upon the scope of a Title VII judicial action "to the scope of the EEOC investigation which can reasonably be expected to grow out of the c h a r g e of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). In this case, the Sixth Circuit has radically departed from this standard by requiring the district court to consider all of Delta's nationwide employment practices despite the limited scope of the charge, the scope of the actual investigation and conciliation efforts conducted by the EEOC or the wrong of which McBride complained in his judicial complaint. Prior to this case, no circuit has remanded a Title VII case for consideration of matters beyond the scope of the charge, investigation, conciliation, pleadings, proof and assignments of error.

McBride's Brief in Opposition does not address these points though they constitute principal issues on which Delta seeks review.

IV.

McBride has also entirely ignored the second issue presented in Delta's Petition. He makes no mention of the unorthodox action of the Sixth Circuit Court of Appeals in remanding the case for consideration of matters entirely beyond the scope of the pleadings, evidence at trial and assignments of error on appeal. But, nevertheless, the issue is of importance, and should be resolved by decision here.

V.

McBride has also sought to justify his right to represent a class of Delta employees, which until now he limited to the Memphis terminal. While he has cited a number of cases which assertedly stand for the proposition that a minority employee who has failed to establish discrimination as to himself may nevertheless be an appropriate representative of a class of discriminatees, he has totally ignored the recent decision of this court in *East Texas Motor Freight System, Inc., v. Rodriguez*,— U.S.—, 97 S.Ct. 1891 (1977). *Rodriguez* requires that "a class representative must be part of the class and 'possess the same interest and suffer the same injury as the class members.'" *Id.* at 1986. Since McBride's individual claim was denied before any class was certified in his case, a remand to consider representation by McBride of *any* class of Delta employees is entirely inappropriate. *Id.* at 1898, n. 12.

VI.

Simultaneously with the filing of his Brief in Opposition, McBride moved this Court for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915. Delta opposes such motion on the ground that McBride has been employed by Greyhound Lines for more than three years and is now earning in excess of $15,000.00 a year with only his wife as a dependent. (Appendix A-38 to Delta's Brief in Opposition filed September 20, 1977, in No. 77-5308.) As case authority clearly indicates, McBride is not a truly impoverished litigant who would be without legal remedy if not afforded the opportunity to proceed in forma pauperis. *Adkins v. E. I. duPont de Nemours & Co., Inc.*, 335 U.S. 331, 339 (1948); *Brewster v. North American Van Lines, Inc.*, 461 F.2d 649, 651; *Dreyer v. Jalet*, 349 S.Supp. 452 (S.D.Tex. 1972), *aff'd* 479 F.2d 1044 (5th Cir. 1974).

It is noteworthy that even after challenge of his right to proceed in forma pauperis in Cause No. 77-5308, he did not attempt to bolster his general affidavit with his own deposition. He relied solely on the deposition of a general sessions court clerk as to minor judgments which may or may not have been satisfied, the most recent of which was rendered in September 1973. Therefore, his motion should be denied.

WHEREFORE, Certiorari should be granted as prayed, and McBride's motion for leave to proceed in forma pauperis should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1977, three copies of the Petitioner's Reply to the Brief in Opposition were mailed, postage prepaid, to A. G. Burkhart, Jr., 1016 Derman Building, Memphis, Tennessee 38103, Counsel for Respondent. I further certify that all parties required to be served have been served.

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